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CHARLES ELMORE CROPLEY

No. 421

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

vs.

KIYOKUBO OKUKURA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA

v.

DEAN ACHESON, AS SECRETARY OF STATE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decision and the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the decision, which includes the findings of fact and conclusions of law, as well as the opinion, is annexed hereto as Appendix A. A copy of the final judgment is annexed hereto as Appendix B.

JURISDICTION

The decision of the District Court was entered September 12, 1951, and a final judgment was entered October 11, 1951. A petition for appeal is presented to the District Court herewith, on October 11, 1951. The jurisdiction of the Supreme Court to review on direct appeal a decision or judgment holding an Act of Congress unconstitutional in a civil proceeding to which an officer of the United States is a party is conferred by 28 U.S.C. 1252 and 28 U.S.C. 2101(a). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on direct appeal in this case. *Fleming* v. *Rhodes*, 331 U. S. 100; *United States* v. *Bekins*, 304 U. S. 27.

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it has in Section 401(c) and (e) of the Nationality Act of 1940, that a person who is a national of the United States by birth shall lose his nationality by entering or serving in the armed forces of a foreign state, if he has or acquires the nationality of such foreign state, or by voting in a political election in a foreign state.

STATUTE INVOLVED

Section 401 of the Nationality Act of October 14, 1940, c. 876, 54 Stat. 1138, 1168, 8 U.S.C. 801, provides in pertinent part as follows:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

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(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

* * * * *

(e) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; * * *

STATEMENT

The plaintiff-appellee filed in the District Court for the District of Hawaii a complaint under Section 503 of the Nationality Act (8 U.S.C. 903) seeking a judgment declaring him to be a citizen of the United States. After trial the District Court found the following facts:

Plaintiff was born in Hawaii in 1921 and was at birth a citizen of the United States and a subject of Japan. At the age of 4 he was taken to Japan for educational purposes and remained there until 1932 when he returned to the United States. In 1934 he again went to Japan. In 1943 he was inducted into the Japanese army and served until 1945. In 1947 he voted in a political election in Japan. In 1949 he applied for a United States passport which was refused on the ground that he had lost his United States citizenship.

The District Court held that Congress had no constitutional power to divest an American born citizen of his nationality because he served in a foreign army or voted in a foreign election. While conceding that "a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a

specific, as distinguished from constructive, intention to cast off his United States citizenship," the court ruled that, as to persons who are United States citizens by birth, "the only means of divesting one's self of United States citizenship is by voluntarily undergoing in a foreign state a process comparable to our own naturalization procedure. Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated."

The District Court accordingly granted plaintiff's petition that he be declared a citizen of the United States.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court, holding that Congress may not condition the loss of citizenship on the doing of an act, other than undergoing the formal process of naturalization in a foreign state, nullifies the considered judgment of Congress as to the conditions under which a citizen of the United States by birth may lose his American nationality. To a large extent it invalidates the whole pattern established for dealing with problems of dual nationality and dual allegiance since the reasoning of the District Court would necessarily affect, not only the particular clauses of the Nationality Act directly involved, but also all other clauses by which loss of nationality is made dependent on some act other than the process of naturalization.

The decision completely disregards the decisions of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests. *Savorgnan* v. *United States*, 338

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U. S. 491; *Mackenzie* v. *Hare*, 239 U. S. 299; see also *Miranda* v. *Clark*, 180 F. 2d 257 (C.A. 9); *Ex parte Griffin*, 237 Fed. 445 (N.D.N.Y.).

The District Court holds that a citizen by birth can lose his nationality only by going through the formal process of naturalization in a foreign state. That position was, however, rejected by the Supreme Court in *Mackenzie* v. *Hare*, 239 U. S. 299, when it upheld the validity of Section 3 of the Act of 1907, providing that any American woman who married a foreigner should take the nationality of her husband. Referring to the absence of an express provision in the Constitution giving Congress the right to provide for loss of citizenship—a consideration relied upon by the District Court in the instant case—the Supreme Court said, in the *Mackenzie* case, at p. 311—

> But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.

The *Mackenzie* case also rejected the contention, implicit in the District Court opinion, that Congress cannot condition loss of nationality on any act other than one evincing a subjective intent to renounce American citizenship. Referring to the claim that "no act of the legislature can denationalize a citizen without his concurrence," the Supreme Court said, 239 U. S. at p. 312, "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the

concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences."

In *Savorgnan* v. *United States*, 338 U. S. 491, the Supreme Court pointed out, at p. 497, that "Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people," and further, at p. 499, that "the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them." Nowhere in the opinion is there any intimation that the fixing of such objective conditions for loss of nationality is beyond the constitutional power of Congress.

In *Ex parte Griffin*, 237 Fed. 445 (N.D.N.Y.), where the act of expatriation relied on was the taking of an oath of foreign allegiance, the court, referring to Section 2 of the 1907 Act, said, at p. 453:

> Conceded that a sovereign cannot discharge a subject from his allegiance and arbitrarily deprive him of his citizenship against his consent, except as a punishment for crime, and that Congress cannot abridge or enlarge the rights of citizens * * *; still the right of a citizen to expatriate himself exists * * * and the sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship.

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In *Miranda* v. *Clark*, 180 F. 2d 257 the United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940, 8 U.S.C. 801(e), providing for loss of United States citizenship by voting in a political election in a foreign state, was constitutional. It ruled that the provisions of the statute "bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."

We submit that the decision and judgment of the District Court are clearly erroneous. In fact, it is so contrary to the controlling decisions of the Supreme Court that we suggest that it may properly be reversed without argument.

Respectfully submitted,

HOWARD K. HODDICK,
United States Attorney,
Counsel for Defendant.

OCTOBER 11, 1951.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

DECISION

This is a Section 903, Title 8, United States Code suit seeking a declaration of United States citizenship.

FINDINGS OF FACT

I find the following as fact:

1. The plaintiff was born at Kauai, Hawaii, United States of America, in 1921.

2. At birth he became a United States citizen, and also a subject of Japan.

3. At age 4, plaintiff was taken to Japan for educational purposes, remaining there until 1932.

4. In 1934, plaintiff returned to Japan to further this Japanese education so that he might return to Hawaii and teach in a Japanese language school.

5. In 1934, plaintiff went to Japan, not upon a United States passport, but possessed only of a certificate of citizenship, Hawaiian Islands, issued by the United States Immigration Service pursuant to regulations.

6. At no time did plaintiff register in Japan as an American citizen with any United States consul.

7. In 1939, as some of his Middle School classmates who were United States citizens decided to return to the United States to avoid the Japanese Military Conscription law, plaintiff joined them, but had proceeded only as far as Kobe, Japan, when

his mother overtook him and compelled his return to school. In fulfillment of his parents' desires, plaintiff was graduated from Middle School, and thereafter attended, until mid 1942, Normal School.

8. At Middle School plaintiff was required to take an officer candidates' examination, and as he rated but a "B", due to his intentionally poor showing, he successfully avoided being rated as an officer candidate for the Japanese Army.

9. Up to 1942, the Japanese government paid one half of a student's tuition at Normal School; thereafter the government paid it in full.

10. Up to 1942, unless repaid, the government could compel a graduate to accept a teaching assignment; thereafter no such option existed, and plaintiff was ordered to and did teach at Niwa.

11. In Mid-June 1942, plaintiff received his notice to report for a Japanese Army physical examination.

12. Fearing the military police and that he would be shot or imprisoned, plaintiff reported for his physical. He, however, approached the colonel in command and asked to be excused as a United States citizen. This request infuriated the officer who slapped the plaintiff and called him an "ideological criminal."

13. Plaintiff passed his physical, and was classified 1-B.

14. Plaintiff was inducted into the Japanese Army in February 1943, seeing active service in China until captured in August 1945. He was returned to Japan in 1946. Prior to being separated from the Japanese Army, plaintiff had been promoted to the rank of sergeant.

15. When released, plaintiff returned to the parental residence in Japan, and thereafter resumed teaching school while awaiting further instructions when possible from his father who was, and had been during the war, in Hawaii.

16. In order to teach in postwar Japan, plaintiff had to be and was "cleared" by SCAP.

17. The war having blighted plaintiff's prospect of ever teaching in a Japanese language school in Hawaii, plaintiff took his father's advice and trained for a year to become a Buddhist priest.

18. In 1947, in Japan, plaintiff voted because General MacArthur had urged all to vote, and because he had heard that non-voters would lose their rice rations.

19. In 1949, being ready to return to Hawaii as a Buddhist priest, plaintiff applied for a United States passport. His application was denied on the ground that he lost his United States citizenship by serving in the Japanese Army.

Conclusion of Law

The plaintiff is entitled to the declaration of United States citizenship prayed for because Section 801(c) and (e) of Title 8, United States Code, is unconstitutional.

Opinion

1. Introduction

May Congress divest a native born citizen of his birthright?

This inquiry raises the question of the long assumed constitutionality of 8 U.S.C. Section 801(c) and (e), which reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> * * * * *

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"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * *"

The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. Over such matters Congress has plenary power under Art. 1, Section 8, Clause 4 of the Constitution:

"The Congress shall have power * * *
"To establish an uniform Rule of Naturalization * * *."

Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.

Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?

2. Birth: The Primary Legal Test of American Citizenship

The primary legal test by which United States citizenship is determined is place of birth. The test is a Constitutional one:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

—Amendment XIV, Section 1

It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

The leading case on this subject is United States v. Wong Kim Ark, 169 U.S. 649 (1898). While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

The question there presented by the record was whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a permanent domicile and residence in the United States and were there carrying on business, and were not employed in any diplomatic or other official capacity under the Emperor, became at the time of his birth a citizen of the United States.

After an exhaustive review of the authorities, in the United States and abroad, the Supreme Court said:

> "There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion." (Page 667)

To put beyond further argument the lack of Congressional power to take away American citizenship acquired by birth, the Court continued:

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate *naturalization*, has conferred no authority upon Congress to restrict the

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> effect of *birth*, declared by the Constitution *to constitute a sufficient and complete right to citizenship.*" (Emphasis supplied) (Page 703)

That principle has been followed to the present day. In Morrison v. California, 291 U.S. 82, 85 (1934), Mr. Justice Cardozo said, citing the Wong Kim Ark decision, supra:

> "A person of the Japanese race is a citizen of the United States if he was born within the United States."

And in Dos Reis v. Nicolls, 1 Cir., 161 F. 2d 860, 862 (1947), the Court said:

> "When Camara was born in Massachusetts in 1921, he then became an American citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment)," citing the Wong Kim Ark case, supra.*

3. The "Right" of Expatriation is not to be Converted into a Liability by Congressional Fiat.

Section 800 of Title 8, United States Code, deals eloquently with the "right" of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that "right" may become a liability.

It is the holding of this Court that the only means of divesting one's self of United States citizenship is by voluntarily undergoing in a foreign

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* This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U. S. 299, 311-312; Perkins v. Elg, 307 U.S. 325, 329; and Kawakita v. United States, 9 Cir., decided June 22, 1951. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts.

state a process comparable to our own naturalization procedure.

Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but it is wholly devoid of any power to destroy citizenship by *birth*.

The contention that Congress may wipe out one's status as a United States citizen by declaring that the performance of such and such an act will result in expatriation can be reduced to an absurdity. Suppose, for example, that Congress instead of legislating as it has in Section 801(c) and (e), had simply declared that owning a gun, or voting in a school or a bond election in a foreign state was sufficient to effect a forfeiture of United States citizenship. Or, going a step further, suppose Congress were to say that attending a military parade, or a political rally in a foreign country would do the trick. Can United States citizenship be frittered away so easily?

And there is also another side to be considered. May the duties and responsibilities of United States citizenship be avoided by convenient expatriation under Section 801? See Kawakita v. United States, supra, and other recent treason cases where loss of citizenship was asserted as a defense.

United States citizenship may more easily be acquired than lost.

Stricter enforcement of the law of treason may well be the solution to the problem of dual citizens such as this, who selfishly play one country against the other.

4. Conclusion

It is the opinion of this Court that a native American citizen can be deprived of his birthright

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only if he undergoes some foreign procedure comparable to our system of naturalization.

The Constitution of the United States prescribes only two methods by which American citizenship can be acquired: by birth and by naturalization. I do not believe that Congress can specify means of losing that citizenship that are in no way related to the means of acquiring it.

Petition granted.

Dated: Honolulu, Territory of Hawaii, September 12, 1951.

(S.) J. FRANK MCLAUGHLIN,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

JUDGMENT

The above cause having come on regularly for trial on April 26 and 27, 1951, before the Honorable

J. Frank McLaughlin, Judge Presiding, without a jury, no jury having been requested, the plaintiff appearing by his attorneys, A. L. Wirin of Los Angeles, California, and Katsuro Hino of the law firm of Fong, Hino and Choy of Honolulu, and the defendant appearing by his attorney, Howard E. Hoddick, United States Attorney, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having heard the arguments of counsel and being fully advised in the premises and having heretofore filed a decision in this matter which contains findings of fact and conclusions of law on September 12, 1951, now makes and enters the following:

JUDGMENT

The plaintiff is and has been at all times herein a citizen of the United States, and is herewith adjudged to be a citizen of the United States, with all the rights and privileges thereof.

Dated at Honolulu, T. H. this eleventh day of October, 1951.

(S.) J. FRANK MCLAUGHLIN,
Judge, United States District Court.

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Nos. 421 and 422

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

KIMURA OKIMURA

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 421

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

KIYOKURA OKIMURA

No. 422

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

As we pointed out in our Statement as to Jurisdiction in No. 421, the court below held categori-

cally that Congress has no power to divest a native born American citizen of his nationality except where he voluntarily acquires foreign nationality by naturalization. Appellees apparently would not go that far; they argue in their motions to dismiss or affirm that expatriation can constitutionally be imposed only with the consent of the citizen. We have answered both of these propositions in our jurisdictional statement. We there pointed out that in *Mackenzie* v. *Hare*, 239 U.S. 299, this Court rejected a contention identical with that made by appellees here and held that the voluntary performance of an act which Congress has declared shall result in the loss of American citizenship does not amount to expatriation without the concurrence of the citizen, but is "a condition voluntarily entered into, with notice of the consequences" (239 U.S. at 312). This Court has made it equally clear, both in the *Mackenzie* case and in *Savorgnan* v. *United States*, 338 U.S. 491, 497-502, that an intent not to give up native American citizenship does not relieve the citizen from the consequence of expatriation flowing from his voluntary performance of an objective act of expatriation specified by Congress. In view of these decisions and the others cited in our jurisdictional statement, there is no room for argument that expatriation requires the subjective consent of the citizen.

Appellees' reliance upon certain language in the opinion of the First Circuit in *Dos Reis ex rel.*

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Camara v. *Nicolls*, 161 F. 2d 860, is misplaced. That court's doubts as to the validity of a literal application of Section 401(c) of the Nationality Act of 1940 (8 U.S.C. 801(c)) to Camara stemmed from the fact, as found by the District Court, that "His service as a draftee in the Portuguese army, with a concentration camp as the alternative, was under duress." (161 F. 2d at 862.)[1] The court held, however, that the constitutional question engendered by this finding was avoided by its interpretation of Section 401(c), based upon an exhaustive review of the legislative history, as being applicable only to voluntary service in the armed forces of a foreign state. The court did not question its validity as so construed.[2]

Appellees argue, however, that the judgments below can be sustained on the "non-constitutional" ground that their acts of expatriation were involuntary and therefore did not result in loss of their American citizenship.

We agree that if these acts were in fact and in law involuntary, appellees did not lose their citi-

[1] Appellees omit this sentence, and others, from their quotation from the opinion, thus creating the impression that the court's reference to "the circumstances here presented" related only to Camara's native birth. The portion omitted by appellees makes it clear that the court was referring to the circumstances of Camara's dual nationality and his involuntary impressment into the Portuguese army.

[2] Appellees' statement that *Dos Reis* v. *Nicolls*, *supra*, was "accepted" in *Savorgnan* v. *United States*, *supra*, is misleading. The *Dos Reis* case was cited in *Savorgnan* only as a dissimilar case involving "real duress" (338 U.S. at 502, fn. 18).

zenship. But no such conclusion is before the Court on these appeals. The District Court's findings referred to by appellees are findings of fact relating to certain circumstances to which appellees were exposed before they committed the acts in question. It might be that the trial court on the basis of these facts would conclude that the resulting acts of appellees were involuntary. But the court below made no such finding. It based its entire decision on the one conclusion of law it made, i.e., that 8 U.S.C. 801(c) and (e) are unconstitutional.

Indeed, there is language in the District Court's opinion in No. 421, which it adopted in No. 422, which, if not in and of itself sufficient to amount to a finding that appellees acted voluntarily, is at least inconsistent with a conclusion that their acts were involuntary. In discussing the sole issue it considered involved in the case, the court said:

> Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, *he served in the Japanese Army or voted in an election in Japan?* [Italics supplied.]

It is clear from this language that the court was assuming voluntary service in the Japanese Army and voluntary voting in a Japanese election.

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But even more inconsistent with a conclusion that appellees' acts were involuntary is the following language of the court in the closing passages of the opinion:

> Stricter enforcement of the law of treason may well be the solution to the *problem of dual citizens such as this, who selfishly play one country against another.* [Italics supplied.]

If the court had found that appellees had been coerced into committing the acts here involved, it would be strange indeed for it to charge them with selfishly playing one country against another. In any event, such language would indicate that the court did not conclude that their actions were involuntary.

In these circumstances, we submit that it is inappropriate to ask this Court to affirm the judgments of the District Court on the ground that appellees' acts were involuntary. True, the District Court made what might be considered subsidiary findings as to voluntariness. It did not, however, make the ultimate finding on that question. It cannot be said, therefore, that the District Court's judgments are sustainable on the ground advanced by appellees. Rule 52(a) of the Federal Rules of Civil Procedure requires the District Court to make findings of fact and conclusions of law. It has been the settled practice of this Court that when a lower court fails in this duty, this Court will not search the record to find a basis for

the lower court's order, but will remand the cause for appropriate findings. *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 213; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) § 197.

Since the sole ground of the decision below is clearly erroneous, we reiterate our suggestion that the judgments be reversed without further argument. In view of appellees' contention, consistently with the allegations of their complaints, that their acts were involuntary, we further suggest that it would be appropriate to remand the cases for further proceedings and decision on that issue.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 421

DEAN ACHESON, AS SECRETARY OF STATE,
Appellant,

vs.

KIYOKURO OKIMURA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

A. L. WIRIN,
FRED OKRAND,
KATSUO MIHO,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 421

DEAN ACHESON, AS SECRETARY OF STATE,
Appellant,

vs.

KIYOKURO OKIMURA

APPELLEE'S STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

Appellee above named, for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

This Court Has Technical Jurisdiction to Hear the Appeal

Inasmuch as the trial court did decide as to the constitutionality of the two statutes involved (8 U. S. C. 801 (c) & (e)), appellee agrees with appellant that this court may review the judgment by direct appeal by virtue of the provisions of 28 U. S. C. 1252 and 28 U. S. C. 2101(a).

Whether the case is of such nature that the jurisdiction of this court ought to be invoked is another question.

II

Probable Jurisdiction Should Not Be Noted Because the Decision Below Is Correct Both on Constitutional and Non-Constitutional Grounds

A

The applicable decisions and authorities sustain the correctness of the lower court's ruling that native born United States citizenship, derived from the Constitution, cannot be taken away by Congress without the consent of the citizen.

See:

United States v. *Wong Kim Ark*, 169 U. S. 649, 703; *Dos Reiss* v. *Nicolls*, 161 F(2d) 860, 862;

"When Camara was born in Massachusetts in 1921, he then became an American Citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment). United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. . . .

"It is by no means clear that Congress would have power to deprive a native-born American citizen of his nationality under the circumstances here presented. In United States v. Wong Kim Ark, supra, the court said, 169 U. S. at page 703, 18 S. Ct. at page 477, 42 L. Ed. 890: 'The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.' By the Act of July 27, 1868, 15 Stat. 223, 8 U. S. C. A. § 800, Congress declared that the 'right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.' The reference, of course, is to voluntary expatriation. Mackenzie v. Hare, 1915,

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239 U. S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645, is authority for the proposition that Congress has some legislative power on the subject of nationality and loss of nationality. . . . The Citizenship Act of 1907 was held to be applicable, though the woman had never taken up a residence abroad subsequent to her marriage. As so applied, the Act was held valid. The woman had chosen to marry a foreigner in the face of a statutory provision that such marriage constituted a renunciation of American citizenship—'a condition voluntarily entered into, with notice of the consequences.' But the opinion of the court in Mackenzie v. Hare, 239 U. S. at page 311, 36 S. Ct. at page 108, 60 L. Ed. 297, Ann. Cas. 1916E, 645, was careful to add: 'It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature.'

"From the language of § 401(c) and its legislative history, we think an interpretation which avoids this constitutional question is fully warranted."

cf. *Moser* v. *United States*, 341 U. S. 41.

Just as, even today, there is no right in a citizen to expatriate himself without the consent of the government (e. g. 8 U. S. C. 803; cf. wartime legislation to enable certain American born Japanese to expatriate themselves: 8 U. S. C. 801(i), as recounted in *Acheson* v. *Murakami*, 176 Fed. (2d) 953, 962 (C. C. A. 9), Finding 19),[1] so also, because citizenship is not a one-way street, but rather a two-way highway on which both the citizen and his government have reciprocal rights and obligations (*Ainslee* v. *Martin*, 9 Mass. 454), is there no right in the government,

[1] Accord: *Stranks* v. *Dupont*, 3 Pet. (U. S.) 241, 245; Slaymaker, *The Right of the American Citizen to Expatriate*, 37 Am. L.R. 191, 192; Moore, *A Hundred Years of American Diplomacy*, 14 Harv. L.R. 165, 179; Dutheer, *The Right of Expatriation*, 11 Amer. L.R. 447, 474; Swift, *A System of the Laws of the State of Connecticut*, (Wyndham, Conn. 1795-96, Vol. 1, p. 164); 1 Blackstone, Commentaries, 367 et seq.

save as punishment for crime (*ibid*), to discharge a subject from citizenship against his consent (*ibid*). Indeed, the very cases relied upon by appellant sustain this point. There was, of course, in the *Savorgnan* case (338 U. S. 491) no question as to constitutionality involved.

B

The judgment of the lower court is correct and can be sustained without the constitutional question being reached.

It is axiomatic that if a judgment of a lower court is sustainable on any ground, even though the trial court relied on a different ground, the appellate court will sustain the lower court's judgment.

Oklahoma v. *United States Civil Service Commission*, 330 U. S. 127;

Aetna Casualty & S. Co. v. *Flowers*, 330 U. S. 464;

cf. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129.

It is equally axiomatic that if a case can be disposed of on a non-constitutional ground, the case will be so decided by this court and the constitutional question will not be reached.

Railroad Commission v. *Pullman Co.*, 312 U. S. 496;

Arkansas Louisiana Gas Co. v. *Dept. of Public Utilities*, 304 U. S. 61;

Coffman v. *Breeze Corp., Inc.*, 323 U. S. 316;

Burton v. *United States*, 196 U. S. 283;

cf. *Sweatt* v. *Painter*, 339 U. S. 629, 631.

The decision below is amply sustainable on non-constitutional grounds, namely, that appellee did not act voluntarily, but rather under duress and coercion and therefore his citizenship cannot be held lost, regardless of the constitutionality of the statute involved.

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Just as the principles suggested above are plain, so is it equally plain that unless the citizen acted voluntarily, he will not be held to have lost his citizenship even if he physically performed the forbidden acts.

Perkins v. *Elg*, 307 U. S. 315, 334:

> "Expatriation is the *voluntary* renunciation or abandonment of nationality or allegiance." (Italics added)

Dos Reiss v. *Nicolls*, 161 F. (2d) 860 (C. C. A. 1):

> "Voluntary action . . . is of the essence of the right of expatriation." On re-hearing (p. 868): "To 'expatriate' oneself clearly implies voluntary action."
>
> Accord: *Attorney General* v. *Ricketts*, 165 F. (2d) 953 (C. C. A. 9);
>
> *Acheson* v. *Murakami*, 176 F. (2d) 953 (C. C. A. 9);
>
> *Podea* v. *Acheson*, 179 F. (2d) 306 (C. A. 2).

Dos Reiss v. *Nicolls*, *supra*, is accepted by this Court in *Savorgnan* v. *United States*, 338 U. S. 491.

The Savorgnan case re-asserts the requirement that the acts resulting in loss of United States citizenship be "voluntarily done" (*Savorgnan* v. *United States*, at p. 500); that the act be "voluntarily and knowingly" done (at p. 502); and that Court specifically points out that where there is "real duress" there is no loss of United States citizenship (at p. 502, footnote 18), citing *Dos Reiss* v. *Nicolls*, 161 F. 2d 860 (C. A. 1st Cir.) *supra; Schioler* v. *United States*, 75 F. Supp. 353 (N. D. Ill.); *In re Gogal*, 75 F. Supp. 268 (W. D. Pa.).

It was on the basis of deciding cases on non-constitutional grounds, if possible, that the *Dos Reiss* case, *supra*, was decided.

The court below made findings of fact, as to appelle herein, not challenged by appellant here, as follows:

"7. In 1939, as some of his Middle School classmates who were United States citizens decided to return to the United States to avoid the Japanese Military Conscription Law, plaintiff joined them, but had proceeded only as far as Kobe, Japan, when his mother overtook him and compelled his return to school. In fulfillment of his parents' desires, plaintiff was graduated from Middle School, and thereafter attended, until mid 1942, Normal School."

"8. At Middle School plaintiff was required to take an officer candidates' examination, and as he rated but a 'B', due to his intentionally poor showing, he successfully avoided being rated as an officer candidate for the Japanese Army."

"11. In mid-June 1942, plaintiff received his notice to report for a Japanese Army physical examination.

"12. Fearing the military police and that he would be shot or imprisoned, plaintiff reported for his physical. He, however, approached the colonel in command and asked to be excused as a United States citizen. This request infuriated the officer who slapped the plaintiff and called him an 'ideological criminal'."

"18. In 1947, in Japan, plaintiff voted because General MacArthur had urged all to vote, and because he had heard that non-voters would lose their rice rations."

Thus it is clear that appellant acted not of his own free will and consent but under such duress and coercion as have resulted in restoration to citizenship of many other young Nisei whose cases have been decided by the courts.[2]

Therefore, since appellant did not act voluntarily, he cannot be said to have lost his citizenship and the case should be affirmed on this ground with no need to consider the constitutional question.

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[2] Some of these cases will be listed below under Point III.

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III

If Probable Jurisdiction Is Noted by This Court, Full and Complete Briefs Should Be Filed and Ample Opportunity for Oral Argument Given

Appellee has pointed out above that this is not a case wherein probable jurisdiction should be noted.. If, however, appellee is incorrect and probable jurisdiction is noted, it is respectfully submitted that appellant's suggestion that the case be disposed of without argument should not be followed.

The problem involved as to whether many, many hundreds of Nisei lost their citizenship during and just after the last war with Japan is of great importance. The question has been litigated in many cases in the lower courts [3] and,

---

[3] See, for Example:

Ishikawa v. *Acheson*, 85 Fed. Supp. 1; USDC D Hawaii;
Shibata v. *Acheson*, 86 Fed. Supp. 1; USDC SD Calif.;
Kanno v. *Acheson*, 92 Fed. Supp. 183; USDC SD Calif.;
Motoyama v. *Acheson*, No. 881 USDC Hawaii (Unreported);
Komura v. *Acheson*, No. 10449, USDC SD Cal. (Unreported);
Furukawa v. *Acheson*, No. 8913, USDC SD Cal. (Unreported);
Hosoda v. *Acheson*, No. 10095, USDC SD Cal. (Unreported);
Kato v. *Acheson*, 94 Fed. Supp. 415; USDC SD Cal.;
Ozasa v. *Acheson*, 94 Fed. Supp. 436; USDC SD Cal.;
Hamamoto v. *Acheson*, 98 Fed. Supp. 904; USDC SD Cal.;
Kondo v. *Acheson*, 98 Fed. Supp. 884; USDC SD Cal. (On Appeal);
Yamamoto v. *Acheson*, 83 Fed. Supp. 346; USDC D Ariz.;
Arikawa-Tsunashima v. *Acheson*, 83 Fed. Supp. 473, DC SD Calif.;
Onye v. *Acheson*, 91 Fed. Supp. 129, DC D Hawaii;
Yonemura v. *Acheson*, No. 965, DC D Hawaii (Unreported);
Furuno v. *Acheson*, 94 Fed. Supp. 381; (DC SD Calif.);
Masuko Kai v. *Acheson*, 94 Fed. Supp. 383; (DC SD Calif.);
Seki v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);
Rokui v. *Acheson*, 94 Fed. Supp. 439; (DC SD Calif.);
George Yada v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);
Kuwahara v. *Acheson*, 96 Fed. Supp. 38; (DC SD Calif.);
Henry Yada v. *Acheson*, No. 1008-SD; (DC SD Calif., Unreported);
Nakashima v. *Acheson*, 98 Fed. Supp. 11; (DC SD Calif.);
Uyeno v. *Acheson*, 96 Fed. Supp. 510; (USDC D Wash.);

being concerned with the precious right of citizenship, ought not be summarily treated or diposed of. If probable jurisdiction is noted, full opportunity for the filing of briefs and for oral argument should be given.

Moreover, it is to be noted that cases concerning the very statute here involved and related ones are even now on their way to this court, extensions of time within which to file petitions for writ of certiorari having been granted.[4]

WHEREFORE, appellee respectfully submits that the within appeal be dismissed or that the judgment of the District Court for the District of Hawaii be affirmed.

A. L. WIRIN,
FRED OKRAND,
KARSUO MIHO,
Counsel for Appellee.

Kuniyuki v. *Acheson*, 189 F. (2d) 741; on reh. 189 F. (2d) 897; now on petition for Writ of Certiorari;
Furusho v. *Acheson*, 94 Fed. Supp. 1021 (DC D Haw.).

Cf. as to elections in Germany:

Brehm v. *Acheson*, 90 Fed. Supp. 662; (DC SD Tex.);
Wohlmuth v. *Acheson*, No. 520-50 Civ. (DC DC) (On Appeal).

And there are about 50 other cases awaiting trial.

[4] *Acheson* v. *Kuniyuki*, 189 Fed. (2d) 741, on reh. 190 Fed. (2d) 897 (CA 9); *Kawakita* v. *United States*, 190 Fed. (2d) 506 (CA 9); Petition for Certiorari filed Nov. 21, 1951, No. 220.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 421-422

DEAN ACHESON, as Secretary of State,
Appellant,

vs.

KIYOKURA OKIMURA

DEAN ACHESON, as Secretary of State,
Appellant,

vs.

HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

APPELLEES' REPLY MEMORANDUM TO MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM.

We dissent from the suggestion made by the Solicitor General in the Memorandum for Appellant in Opposition to Appellees' Motions to Dismiss or Affirm:

> "Since the sole ground of the decision below is clearly erroneous, we reiterate our suggestion that the judgments be reversed without further argument. . . ."

We respectfuly suggest that so important a question in the administration and enforcement of the United States Nationality Act, and its various provisions, 8 U. S. Code, Section 801, subdivisions a to j, warrants consideration by this Court, prior to judgment, a consideration which will be adequate only after thorough briefing and full oral argument of the issue.

The same issue is now directly before this Court in *Kuniyuki* v. *Acheson*, No. 492, this term, and, indirectly, in *Kawakita* v. *United States*, No. 220, Misc., this term.

Counsel for the Appellees herein are also counsel for the Petitioners in both *Kuniyuki* and *Kawakita*.

It would be appropriate, accordingly, that in the event this Court notes probable jurisdiction herein, and grants certiorari in either *Kuniyuki* or *Kawakita*, that the cases follow each other on oral argument.

In view of the fact that counsel for the Appellees herein are also counsel for the Petitioners in *Kuniyuki* and *Kawakita*, and the Appellant herein and the Respondents in *Kuniyuki* and *Kawakita* cases will all be represented by the Solicitor General, this Court may expect the avoidance of duplication of presentation both in the brief and oral argument, upon the issue as to the Constitutionality of the provisions of the Nationality Act (8 U. S. C., Sections 801(c) and (e)) held invalid in the Trial Court below.

Respectfully submitted,

A. L. Wirin & Fred Okrand.

JANUARY 2, 1952.

Per Curiam Decisions.

No. 421. ACHESON, SECRETARY OF STATE, *v.* OKIMURA. Appeal from the United States District Court for the District of Hawaii. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for specific findings as to the circumstances attending appellee's service in the Japanese Army and voting in the Japanese elections and the reasonable inferences to be drawn therefrom. MR. JUSTICE BLACK is of the opinion the judgment should be affirmed. MR. JUSTICE DOUGLAS, being of the view that the findings are adequate to show that the services of appellee to Japan were rendered under the compulsion

of military and other sanctions, evidenced in some instances by physical beatings, dissents to vacation and remand. *Solicitor General Perlman* and *Howard K. Hoddick* for appellant. *A. L. Wirin, Fred Okrand* and *Katsuo Miho* for appellee. Reported below: 99 F. Supp. 587.